

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION)	FINAL ORDER
WATER RIGHT NO. G33710-41S BY)	
FLOYD R. BLAIR)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written submissions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision of March 23, 1987, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Subject to the terms, restrictions, conditions and limitations specified below, Application for Change of Appropriation Water Right Permit No. G33710-41S by Floyd R. Blair is granted to change the place of diversion of Smith Creek water from a point on Smith Creek in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 18 North, Range 15 East, Fergus County, Montana, to a

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point on Wolf Creek in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19 North, Range 15 East, Fergus County, Montana; to change the means of diversion from a dam to a pump; to change the place of storage from an on-stream reservoir located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 18 North, Range 15 East, Fergus County, Montana, to an off-stream reservoir located in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19 North, Range 15 East, Fergus County, Montana; to change the place of use for stock water from the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 18 North, Range 15 East, Fergus County, to the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19 North, Range 15 East, Fergus County, Montana.

Application to change the place of irrigation use is hereby specifically denied.

This authorization is subject to the following express terms, conditions and restrictions:

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

C. The Permittee shall maintain an adequate device for taking accurate measurements of the flow of Smith Creek at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 18 North, Range 15 East, Fergus County, Montana. He shall also maintain a device

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enabling him to take accurate measurements of the output of his diversion pump, located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19 North, Range 15 East, in terms of flow and cumulative volume diverted.


Applicant shall in no circumstance divert a greater flow by means of his diversion pump than is at that time flowing in Smith Creek as measured by the device to be maintained thereon.


D. Permittee shall keep written records of the flow rate and volume of all water diverted, including the period of times diverted. Permittee shall further record the flow rate of Smith Creek at least once weekly during any period in which he is diverting water pursuant hereto. Permittee shall submit such records to the Department upon demand.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 30 day of July, 1987.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on July 30, 1987, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department on the Application for Change of Appropriation Water Right No. G33710-41S, by Floyd R. Blair, addressed to each of the following persons or agencies:

Floyd R. Blair
Route 1, Box 48
Denton, MT 59430

Barber Ranch, Inc.
Robert T. Barber
President
Denton, MT 59430

Gary Fritz
Administrator
Water Resources Division
DNRC
1520 East Sixth Avenue
Helena, MT 59620-2301
(hand-deliver)

Sam Rodriguez, Manager
Water Rights Bureau
Field Office
P O Box 438
Lewistown, MT 59457
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Susan Howard

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 30th day of July, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument

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on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1990

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION)	PROPOSAL FOR DECISION
WATER RIGHT NO. G33710-41S BY)	
FLOYD R. BLAIR)	

* * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, Part 4, MCA (1985) and to the contested case provisions of the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6 MCA (1985), a hearing in the above-entitled matter was held on September 26, 1985 in Denton, Montana. The hearing was completed on September 26, 1985 and the record closed. The record was subsequently reopened by Interlocutory Order of December 17, 1985 for submission of additional data. The additional data were timely submitted and were received into the record without objection.

Appearances

The Applicant, Floyd R. Blair, appeared personally.

Objector Barber Ranch, Inc., appeared by and through its representative, Peter L. Barber.

Robert T. Barber appeared as a witness for Barber Ranch, Inc.

Sterling Sundheim of the Lewistown Water Rights Bureau Field Office appeared as staff expert witness for the Department of Natural Resources and Conservation (hereafter, "Department").

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STATEMENT OF THE CASE

On September 7, 1983, Applicant filed an Application for Change of Appropriation Water Right, seeking changes in Permit No. G33710-41S.

Under the Permit as issued, Applicant had planned to, but never did, construct a dam on Smith Creek in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 18 North, Range 15 East, Fergus County, Montana. Said dam would have created a reservoir with a capacity of 15 acre-feet where Applicant had planned to store water for sprinkler irrigation use on 15 acres in the NW $\frac{1}{4}$ of Section 2 and 30 acres in the NE $\frac{1}{4}$ of Section 3; all in Township 18 North, Range 15 East, Fergus County, Montana; and for stock water. The water would have been moved from the reservoir to the place of use by pump. The water was to be appropriated by impoundment at a rate of 15 cubic feet per second from January 1 to December 31, inclusive, each year, up to 109 acre-feet per year for irrigation use from March 15 to November 30, inclusive, each year; and up to 2 acre-feet per year for stock watering use from January 1 to December 31, inclusive, each year.

Applicant by this Application proposes instead to divert Smith Creek water, by means of a pump to be located on Wolf Creek at a point of diversion in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19 North, Range 15 East, Fergus County, Montana, which point is downstream from the Smith Creek-Wolf Creek confluence. Applicant would utilize Wolf Creek as a carrier for Smith Creek water and would pump from Wolf Creek only the amount of water which is contributed thereto by Smith Creek.

Smith Creek water would be piped from the Wolf Creek pump site either directly to the place of use specified in Permit No. 33710-41S or to a reservoir in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19 North, Range 15 East, Fergus County, Montana, where it would be stored for later irrigation on the place of use specified in Permit No. 33710-41S and used in situ for stock water.

At the hearing, Applicant proposed for the first time to change the place of irrigation use from that described in Permit No. 33710-41S to 45 acres allocated in unspecified proportions to the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 2 and NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3, in Township 18 North, Range 15 East, Fergus County, Montana, and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34 and the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, in Township 19 North, Range 15 East, Fergus County, Montana. This proposed change in place of use was not reflected in the Public Notice or Application.

Objector believes that the diversion of any water from Wolf Creek after May 30 of any given year will have an adverse effect on its stock water right.

Exhibits

The Applicant, Floyd R. Blair, submitted one exhibit in support of his Application in this matter.

Applicant's Exhibit 1 consists of two pages: (1) a typed statement explaining details of (2) a copy of a topographic map representing the areas of use, points of diversion, pipelines and reservoirs, both as previously authorized and as proposed hereunder by Applicant.

Applicant's Exhibit 1 was accepted into the record without objection.

The Objector Barber Ranch Inc., submitted one exhibit in support of its objection in this matter.

Objector's Exhibit A is a typed statement summarizing Objector's reasons for objecting, dated September 26, 1985.

Objector's Exhibit A was accepted into the record without objection.

The Department offered one exhibit for admission into the record at the hearing.

Department Exhibit 1 is a Memorandum re: Field Report By Sterling Sundheim, Engineer, Lewistown Field Office, to file No. G33710-41S by Floyd R. Blair.

Department Exhibit 1 was accepted into the record without objection.

The Department also offered one exhibit for admission into the record on February 2, 1987, in response to the Interlocutory Order.

Department Exhibit 2 is a memorandum dated June 12, 1986 (updated January 30, 1987), from Sterling Sundheim of the Lewistown Water Rights Bureau Field Office, containing flow measurement data for Wolf Creek compiled by Mr. Sundheim and Applicant. It includes a description of the method of measurement used, the results obtained, and conclusions drawn therefrom by Mr. Sundheim, Civil Engineer III.

Department Exhibit 2 was admitted without objection.

Preliminary Matters

Applicant's proposal to change the place of irrigation use by this Change Application, made initially at the hearing conducted in this matter, amounts to a motion to amend this Application so as to include the proposed change.

As this proposed change was not contemplated under the Application as filed, and therefore not included in the Public Notice, the possibility exists that this proposed change may have been grounds for objection by appropriators other than those that did file objections. Therefore, because the requirements of due process must be met before any change is authorized, Applicant's motion to amend this Application so as to include a proposed change in place of use for irrigation is hereby denied.

Applicant may, however, properly apply for the proposed change in place of use by filing with the Department a new Application for Change of Appropriation Water Right, specifying therein the proposed change in place of use. The Department shall then give proper notice thereof.

Objectors present at the hearing conducted in this matter on September 26, 1985 in Denton, Montana, having received actual notice at the time of the proposed change in place of use, and having then raised no objection, and further having then made no comments which could be interpreted as reserving objection, are estopped from asserting any objection to a new Application for Change which may be made by Applicant, providing that said Application proposes substantially the same change in place of use as had been proposed at above-said hearing.

PROPOSED FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto.

2. The Application for Change of Appropriation Water Right in this matter was duly filed with the Department on September 7, 1983 at 9:40 a.m.

3. The pertinent portions of this Application were published in the Lewistown News-Argus, a newspaper of general circulation in the area of the source, once a week for two consecutive weeks, on January 25 and February 1, 1984.

4. Section 85-2-402 MCA states ". . .the Department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

- (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
- (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.
- (c) The proposed use of water is a beneficial use."

5. Applicant presently possesses Permit No. 33710-41S which authorizes year-round diversion by impoundment of 15 cfs up to 111 acre-feet per annum from Smith Creek for use as follows: up to 109 acre-feet per annum to be used between March 15 and November 30 each year for sprinkler irrigation of 15 acres in the NW $\frac{1}{4}$ of Section 2 and 30 acres in the NE $\frac{1}{4}$ of Section 3, all

in Township 18 North, Range 15 East, Fergus County, Montana; and up to 2 acre-feet per annum to be used year-round for stock water in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 18 North, Range 15 East, Fergus County, Montana. The authorized means of diversion is a dam with a capacity of 15 acre-feet to have been located at a diversion point on Smith Creek in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 18 North, Range 15 East, Fergus County, Montana. Stock would have watered directly from the place of storage, a reservoir formed by said dam; water would have been pumped from the reservoir to the place of use for sprinkler irrigation. Permittee is authorized to store water in said reservoir year-round.

6. Applicant has not constructed the diversion works authorized under Permit No. 33710-41S because of the infeasibility of building a dam at the location authorized under the Permit. Thus Applicant has not exercised the right granted under said Permit. (Testimony of Floyd Blair.)

7. The Applicant has a present bona fide intent to appropriate water for irrigation of small grains and other crops. (Testimony of Floyd Blair.)

8. Applicant continues his intention to use Smith Creek as the source of supply under this change. He desires, however, to utilize Wolf Creek, to which Smith Creek is tributary, as a carrier for Smith Creek water, and to change the point of diversion to a point on Wolf Creek located approximately $\frac{3}{4}$ of a mile downstream from the presently authorized point of diversion. The new point of diversion would be at an existing pump site located on the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19

North, Range 15 East, Fergus County, Montana. The Applicant intends to replace the existing pump with a pump having a capacity of approximately 1,000 gpm (2.23 cfs). (Applicant's Exhibit 1, testimony of Floyd Blair.)

9. Applicant proposes to ensure that no more water would be diverted from Wolf Creek than is supplied to it by Smith Creek by taking measurements of the flow of Smith Creek at a culvert presently in place, just upstream from the confluence of Smith Creek and Wolf Creek, and limiting his diversion from Wolf Creek to the flow then in Smith Creek as shown by these measurements. Applicant would install a flow meter at the point of diversion for measurement of amounts diverted. (Testimony of Floyd Blair.) As there are no diversions of record between the present point of diversion and the proposed point of diversion, this method of diversion regulation will be adequate, if there is no significant stream loss between said points, and providing that the flow measurements taken are accurate. (Department Exhibit 1.)

10. Applicant proposes to pump water from the proposed Wolf Creek point of diversion either a) directly to the place of use for irrigation presently authorized under Permit No. 33710-41S or b) to a changed place of storage, a reservoir presently under construction in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19 North, Range 15 East, Fergus County, Montana. Water stored in said reservoir would be later pumped to and used at the place of use for irrigation authorized under Permit No. 33710-41S.

(Testimony of Floyd Blair.) The place of use for stock water would be changed to said reservoir.

Said reservoir is presently used for the purpose of storing water appropriated under Permit No. 33738-s41S, but can be utilized to store additional water as proposed hereunder.

(Testimony of Floyd Blair.) (See Application.)

11. Objector Barber Ranch presented testimony that its claimed existing water right for stock would be adversely affected by any diversion of Smith Creek water during the period commencing May 30 each year, due to the resultant depletion of Wolf Creek flow and a concomitant increase in salinity of water in the deeper holes of Wolf Creek from which its cattle drink.

(Objector's Exhibit A, testimony of Peter Barber.)

12. Upon an independent review of the record, the Hearing Examiner finds that the changes in place of diversion, storage and stock water use proposed by Applicant will not increase either the total annual volume appropriated from Smith Creek or the diversion rate of Smith Creek water. The total volume which may be annually diverted remains 111 acre-feet under the proposed changes; the total volume diverted can be measured and limited to this amount at the proposed pump site.

The authorized diversion rate at present is the entire flow of Smith Creek up to 15 cfs to fill Applicant's storage reservoir, or whatever portion (up to 15 cfs) of the flow of Smith Creek is required to replace amounts used from storage. Under the proposed change, the rate of diversion would never exceed 2.23 cfs (the capacity of Applicant's pump), and would be less if the flow of Smith Creek actually reaching the new point

of diversion is less than 2.23 cfs. Thus, the change will not yield a greater rate of diversion.

13. Significant stream loss, here defined as the occurrence of stream loss between the present and proposed points of diversion exceeding five percent (the margin of error in measurement is about five percent - see Memorandum to File, June 12, 1986; updated January 30, 1987), occurs rarely in those reaches of Smith and Wolf Creek to be utilized as carrier hereunder, and then only during periods of low Wolf Creek flow. Of the 28 usable measurements taken, only two incidents of apparently significant stream loss were recorded.

One measurement, taken August 7, 1986, recorded a stream loss in Wolf Creek of 34.8 percent, a figure which may have been reached due to inherent weir measurement inaccuracy at a very low flow (0.132 cfs). However, on this date the flow of Smith Creek was zero and hence there could have been no diversion of Smith Creek water by Applicant on that day, in any case.

A stream loss of 12.3 percent was recorded on September 11, 1986, and was probably due to the investment of water in bank storage after a long period of extremely low flows in the relevant reaches of Wolf Creek. (Memorandum to file, June 12, 1986, updated January 30, 1987.)

14. Upon an independent review of the record, the Hearing Examiner finds that Objector Barber Ranch has presented no evidence showing that Applicant's proposed changes in point of diversion, place of storage and place of use for stock water will adversely affect Objector's water rights.

Based upon the foregoing proposed Findings of Fact, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all parties hereto.

2. The Department gave proper notice of the hearing and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore the matter was properly before the Hearing Examiner.

3. The Department must approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

- (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
- (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.
- (c) The proposed use of water is a beneficial use. § 85-2-402 MCA (1985).

4. The proposed use of water, irrigation, is a beneficial use. § 85-2-102(2) MCA; Sayre v. Johnson, 33 Mont. 15, 81 p. 389 (1905).

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate for flow rates at or below 2.23 cfs. As Applicant intends to divert water from Wolf Creek by use of a pump with a pumping capacity no greater than 2.23 cfs (Finding of Fact 8), the proposed means of diversion is necessarily adequate only at or below this limit.

6. The Applicant herein has the initial burden of production to show that other water rights will not be adversely affected by the change proposed. Stated in other words, Applicant must show that the proposed change will not increase the burden on the source, thereby amounting pro tanto to a new appropriation (for which the proper procedure to obtain must be followed). Featherman v. Hennessey, 43 Mont. 310, 115 p. 983 (1911); Toohey v. Campbell, 24 Mont. 13, 60 p. 396 (1900); In the Matters of the Application for Beneficial Water Use Permit Nos. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ by Meadow Lake Country Club Estates; and In the Matters of the Application for Change of Appropriation Water Right Nos. 26719-c76LJ and 26727-c76LJ by Meadow Lake Country Club Estates, Final Order, October 6, 1981 (incorporating Proposal for Decision of August 25, 1981).

Applicant's proposed changes will have substantially the same or less of an impact on the source, Smith Creek, than does the presently authorized use, as neither the total volume appropriated nor the rate of diversion would increase by the change.¹ (Finding of Fact 12.) However, due to the proposed utilization of Wolf Creek as a carrier, it must be emphasized

¹The Hearing Examiner has considered another effect of the change, namely that the potential reduction of diversion rate necessitated by the restricted capacity of Applicant's pump may increase the length of time diversion must continue in order to fill the proposed storage reservoir to 15 acre-feet; however, this factor need not be taken into account here, as Applicant, under the present Permit, is entitled, but not required, to divert the entire flow of Smith Creek to fill his reservoir. That is, he is currently entitled to divert at a flow rate equivalent to the projected 2.23 cfs flow rate, over a corresponding period of appropriation.

that only that proportion of water contributed by Smith Creek may be diverted from Wolf Creek; exceeding that proportion would result in a diversion of Wolf Creek water. To state it in other words, so long as only the amount of Smith Creek water which actually reaches the proposed point of diversion on Wolf Creek is diverted, the proposed use will not amount to a new appropriation from a commingled source, i.e., Wolf Creek. Accordingly, as long as the flow diverted from Wolf Creek equals the flow of Smith Creek as measured at the old point of diversion, and so long as there is no significant loss of water in those reaches of Smith Creek and Wolf Creek which are to serve as carriers from the old to the new point of diversion pursuant to the proposed change, there will be no diversion of Wolf Creek water.

There appears to be no significant loss of water in the subject reaches of Smith and Wolf Creek. There are no diversions of record located between the old and new points of diversion (Finding of Fact 9), and data submitted regarding stream loss, i.e., loss due to seepage, evaporation, transpiration, etc., indicates that those reaches of Smith Creek and Wolf Creek here in question rarely lose water due to seepage, evaporation, etc. (Finding of Fact 13.)

Of course, the data indicate that there can be rare occurrences of stream loss. Hence, it is arguable that on such occasions the burden on Wolf Creek could increase due to potential diversion of Wolf Creek water by Applicant (which Applicant would have been physically unable to divert before the

change), that Applicant is therefore making a new appropriation of water hereunder, and that he has thus failed to meet his burden of production. However, such argument is tantamount to a demand for an absolute guarantee against the possibility of unauthorized diversion (a demand which in water rights issues is not susceptible of satisfaction) and further, does not account for the buffering effect of Objector's already existing right (and need, due to Applicant's existing Permit) to call the source.

The data for 1986 indicate that only once during that entire irrigation season might Applicant have diverted Wolf Creek water due to stream loss. However, the occasion occurred during a period of such low flow that Objector would in all probability have had to call the source regardless of whether Applicant was diverting from the old or the new point of diversion. Thus, it appears the potential hereunder for Applicant making a new appropriation pro tanto is largely obviated, due to the correspondence between periods of stream loss in the relevant reaches of Wolf Creek and Smith Creek and extremely low flows therein.² As the potential for incidental diversion of Wolf Creek water is very low, it is hereby concluded that the proposed change will not amount to a "new appropriation" (of

²In an analysis of adverse effect potentially caused by a change in appropriation, possible effects on the prior appropriator's burden, i.e. increases in the hardships which must be borne in order to obtain water, are evaluated. If the proposed change would unreasonably increase this burden on a prior appropriator, e.g., by unreasonably increasing the number of occasions on which he must assert the right of prior appropriation in order to obtain water, the change must be denied. Here, it does not appear that there will be any increase in Objector's burden.

Wolf Creek water) and therefore that the Applicant has met his burden of production.

7. The Objector in a change proceeding bears the burden of production on the issues of the scope and character of its existing rights and the basis of any anticipated injury to these rights that may be caused by the proposed change. See generally, Tanner v. Humphreys, 87 Utah 164, 48 P.2d 484 (1935); Bratten Corp. v. United States, 629 F.2d 467 (7th Cir. 1980), cert. denied 449 U.S 1124 (1981); Old Ben Coal Corp. v. Interior Board of Mine App., 523 F.2d 25 (7th Cir. 1975). The Objector must adduce evidence that the Applicant's proposed change would be injurious to at least some degree. The burden extends to the kind and character of the adverse effect, although not necessarily to the specific measure thereof.

Objector Barber Ranch Inc. has not met its burden of production in that it has presented absolutely no evidence to indicate that the changes proposed by Applicant would be injurious to its water right. (Finding of Fact 14.)

There is no evidence that the change will result in an unreasonable increase in the burden on Objector to call the source (see Footnote 2), or that Objector will suffer any other adverse effect due to the change. Therefore the Hearing Examiner concludes that, providing the Permit is conditioned so that no more water is diverted from Wolf Creek than is supplied thereto by Smith Creek at any given time, the proposed use (resulting from the proposed change) will not adversely affect the water rights of other persons, including the Objector.

8. There is no evidence in the record that other planned uses or developments exist for which a permit has been issued or for which water has been reserved.

9. Objector has attempted to utilize this proceeding to object to the underlying right which Applicant seeks to change. This is not the proper forum for such objection.

The use presently authorized has been so authorized because it conforms to § 85-2-311(2) MCA, which specifically requires that "the water rights of prior appropriators not be adversely affected" by the issuance of a permit. Thus, it has been heretofore concluded by the Department that the use presently authorized does not adversely affect prior appropriators. The consequences of the use, i.e., its effect on prior appropriators, will not change under Applicant's proposal; thus, ipso facto, the proposed use will not adversely affect prior appropriators.

Objector's attempt to utilize this forum to object to the underlying water right, rather than to object to the effect of the proposed change in the right, is improper and futile, as the underlying water right is a property interest of the Applicant which the Hearing Examiner is not empowered hereunder to remove. The Hearing Examiner may propose either a grant or denial of the proposed changes in that right but he may not deprive the Permittee of the right itself.

Even if the change were denied, the right would remain as granted under the original permit, unless subsequently revoked for non-development. Clearly, objection to the original

Application for Permit would have been the appropriate means for Objector to demonstrate any anticipated adverse affect of Applicant's use of Smith Creek water.

Assuming arguendo it could be demonstrated that Applicant's present use (and his proposed use as determined hereunder) in fact work an adverse affect upon Objector's water rights, the proper procedure would be for the Objector to file a written complaint with the Department, which should investigate, and if such action is justified, may order the Permittee to show cause why the Permit should not be modified or revoked. Objector's further remedy is to file an action in District Court alleging violation of a prior water right.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, restrictions, conditions and limitations specified below, Application for Change of Appropriation Water Right Permit No. G33710-41S by Floyd R. Blair be granted to change the place of diversion of Smith Creek water from a point on Smith Creek in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 18 North, Range 15 East, Fergus County, Montana, to a point on Wolf Creek in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19 North, Range 15 East, Fergus County, Montana; to change the means of diversion from a dam to a pump; to change the place of storage from an on-stream reservoir located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of

Section 2, Township 18 North, Range 15 East, Fergus County, Montana to an off-stream reservoir located in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19 North, Range 15 East, Fergus County, Montana; to change the place of use for stock water from the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 18 North, Range 15 East, Fergus County, to the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19 North, Range 15 East, Fergus County, Montana.

Application to change the place of irrigation use is hereby specifically denied.

This authorization is subject to the following express terms, conditions and restrictions:

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

C. The Permittee shall maintain an adequate device for taking accurate measurements of the flow of Smith Creek at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 18 North, Range 15 East, Fergus County, Montana. He shall also maintain a device enabling him to take accurate measurements of the output of his diversion pump, located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 19 North, Range 15 East, in terms of flow and cumulative volume diverted.

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Applicant shall in no circumstance divert a greater flow by means of his diversion pump than is at that time flowing in Smith Creek as measured by the device to be maintained thereon.

D. Permittee shall keep written records of the flow rate and volume of all water diverted, including the period of times diverted. Permittee shall further record the flow rate of Smith Creek at least once weekly during any period in which he is diverting water pursuant hereto. Permittee shall submit such records to the Department upon demand.

NOTICE


This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed Authorization, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Division

Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

DONE this 23 day of March, 1987.


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 26, 1987, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision by the Department of Natural Resources & Conservation (DNRC) on the Application by Floyd R. Blair, Application No. G33710-41S, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

Floyd R. Blair
Rt. 1, Box 48
Denton, MT 59430

Barber Ranch, Inc.
Robert T. Barber, Pres.
Denton, MT 59430

Gary Fritz
Administrator
Water Resources Division
DNRC
1520 E. 6th Ave.
Helena, MT 59620-2301
(hand-deliver)

Sam Rodriguez, Manager
Sterling Sundheim, Engineer
Water Rights Bureau
Field Office, (DNRC)
PO Box 438
Lewistown, MT 59457
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 26th day of MARCH, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John A. [Signature]
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-25-1990

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